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United States Government

MEMORANDUM

**Office of
Government Ethics**

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Subject **Negotiation for Future Employment**

From **David H. Martin
Director**

David H. Martin
DHC

To **Designated Agency Ethics Officials and
Inspectors General**

Attached for such use as you deem appropriate is a set of practical guidelines which address the criminal and regulatory concerns associated with negotiating for future employment. Recently, these issues seem to be of growing concern to employees throughout the entire executive branch.

Negotiation for Future Employment: Practical guidelines addressing criminal and regulatory concerns

With less than two years remaining in this administration, numerous officials may be leaving their government positions to pursue other employment. A government employee is generally not barred from seeking other employment while in the government, even if the prospective employer has dealings with his agency.* It is important, however, that government employees are aware of the restrictions of 18 U.S.C. § 208, a criminal conflicts of interest law that prohibits government employees from taking official acts which affect personal financial interests or financial interests of associated persons and organizations. Included among these disqualifying financial interests are those of a person or organization with whom the employee 1) is negotiating or 2) has any arrangement concerning prospective employment.

The following are general definitions of the substantive terms of the elements of an offense under § 208:

- financial interest - exists if, given all the circumstances relating to the potential outcome of a matter, there is a substantial probability of financial gain or loss to the federal employee.

* Department of Defense employees, after April 16, 1987, will be under new prohibitions pursuant to the 1987 National Defense Authorization Act that may severely restrict post government employment opportunities. DOD Ethics officials should be consulted on specific application of the new law and its implementing regulations.

- official act - personal and substantial participation in a matter -- through decision, approval, disapproval, recommendation, advice, investigation or otherwise.
- negotiate - act or process of communicating or conferring with another so as to arrive at some form of agreement.

In this area of § 208 enforcement, matters are decided on a case-by-case basis because the key terms (i.e. "negotiation", "financial interest") don't lend themselves to simple, clear-cut application; therefore, evidence of a potential violation of §208 is rarely obvious. However, beyond the criminal implications of § 208, Executive Order 11222 and its implementing regulations also apply, which require Government employees to avoid any action which might result in, or create the appearance of, using public office for private gain, giving preferential treatment to any organization or person, losing independence or impartiality of action, or weakening the confidence of the public in the integrity of the government. Thus it is a much broader standard of disqualification than that imposed by § 208.

An employee should avoid acting on matters which directly affect a person or organization if:

- The employee has made contact with the person or organization, either directly or through an intermediary, inquiring about future employment. The Office of Government Ethics does not view the mass distribution of resumes, without additional communications, as being included within this proscription.

- The person or organization has unilaterally expressed an interest to the employee, either directly or through an intermediary, in employing him in the future. Depending on the particular circumstances involved, the employee may avoid having to disqualify himself on matters directly affecting the person or organization by indicating unequivocally that he is not interested in future employment with such employer; disqualification will be required, however, if the employee leaves open any opportunity to pursue further discussions.
- There is an informal or tacit understanding that the employee will join (or return to) the person or organization upon leaving government. However, the mere announcement of departure to pursue private business interests without any employment related contact by or with a prospective employer, standing alone, should not be the basis for requiring disqualification.

The foregoing possibilities could have criminal and/or standards of conduct implications. Thus, it is up to the employee to determine whether he is, or may be, involved in a particular matter that directly affects the prospective employer. If he determines that he is so involved, he should refrain from participating in any aspect of the matter and take appropriate steps to insulate himself from influencing its outcome. In most instances, the employee will know whether a matter within his official responsibility will directly affect the prospective employer. If he lacks adequate knowledge, but suspects a nexus because of the subject matter involved, he should make a good faith effort to obtain additional information by consulting appropriate government officials. If, on the basis of this information, he is uncertain about whether the nexus is sufficient to require disqualification, he should seek advice from his Designated Agency Ethics Official.

Written records should be made of how each issue of disqualification is addressed and resolved. Records should be made of:

- Steps taken to insulate oneself from a matter for which disqualification is required, including the delegations or transferral of authority.
- Responses to unsolicited expressions of interest from prospective employers as well as employment-related contacts.
- Conclusions concerning the need for disqualification and consultations with other government officials involved in providing information or advice.

Above all, each employee should take the time to reacquaint himself with agency specific rules applicable to standards of conduct.